Supreme Court, U.S.
FILED
OCT 14 2008
OFFICE OF THE CLERK

107

No. 08- 08-496

IN THE

Supreme Court of the United States

GILBERT ARREOLA,

Petitioner,

v.

DR. MUHAMMED CHOUDRY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

LAURA D. CULLISON
Counsel of Record
CHRISTINA M. TCHEN
333 West Wacker Drive
Chicago, Illinois 60606
(312) 407-0510

Counsel for Petitioner

218622

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

I. Whether a post-trial evidentiary hearing on juror bias comports with procedural due process standards under the Fifth Amendment when the parties are denied the opportunity to call witnesses, denied the opportunity to examine or cross-examine witnesses, and denied the opportunity to speak during the hearing?

II. Under *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984), which requires a party moving for a new trial on the basis of juror bias to demonstrate that a juror failed to answer honestly a material question on voir dire where a correct answer would have provided a valid basis for a challenge for cause, does the failure to answer honestly include both subjectively dishonest responses and factually inaccurate responses?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF APPENDICES	iv
TABLE OF CITED AUTHORITIES	v
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
PROCEDURAL, CONSTITUTIONAL, AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
A. Introduction	2
B. The Hearing	4
C. The Appeal	9
REASONS FOR GRANTING THE PETITION	11
I. This Petition Raises an Important Question of Federal Law Regarding Procedural Due Process in Juror Bias Hearings	11

Contents

Page

A. A Juror Bias Hearing Must Provide Procedural Due Process 12

B. The Denial of Due Process Prejudiced Arreola 13

C. A Wholly Inquisitorial Procedure Does Not Provide Adequate Procedural Due Process 14

II. This Petition Offers the Opportunity to Resolve a Circuit Split Regarding the *McDonough* Juror Bias Test 15

A. The Subjective Test Covers Only Deliberate Falsehoods 17

B. The Objective Test, Covering Deliberate Falsehoods and Honest Mistakes, is the Proper Standard .. 18

CONCLUSION 20

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Seventh Circuit Decided July 14, 2008 ..... 1a

Appendix B — Opinion Of The United States District Court For The Northern District Of Illinois Dated June 18, 2007 ..... 17a

Appendix C — Transcript Of Proceedings Dated June 14, 2007 ..... 21a

TABLE OF CITED AUTHORITIES

Page

CASES

Amirault v. Fair,
968 F.2d 1404 (1st Cir. 1992) 17

Arreola v. Choudry,
533 F.3d 601 (7th Cir. 2008) 1, 11, 17

Burton v. Johnson,
948 F.2d 1150 (10th Cir. 1991) 14, 19

Davis v. Alaska,
415 U.S. 308 (1974) 12

Jones v. Cooper,
311 F.3d 306 (4th Cir. 2002) 15, 18

Mathews v. Eldridge,
424 U.S. 319 (1976) 9, 12, 14

McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548 (1984) ..... *passim*

Miller-El v. Cockrell,
537 U.S. 322 (2003) 13

Porter v. Illinois,
479 U.S. 898 (1986) 11

United States v. Boney,
68 F.3d 497 (D.C. Cir. 1995) 13

Cited Authorities

Page

United States v. Calbas
821 F.2d 887 (2d Cir. 1987) 12

United States v. Edmond,
43 F.3d 472 (9th Cir. 1994) 17

United States v. Hodge,
321 F.3d 429 (3d Cir. 2003) 17

United States v. Shaoul,
41 F.3d 811 (2d Cir. 1994) 17

United States v. St. Clair,
855 F.2d 518 (8th Cir. 1988) 19

Williams v. Bagley,
380 F.3d 932 (6th Cir. 2004) 17

CONSTITUTION

U.S. Const. amend. V 1, 12, 13, 15

Cited Authorities

Page

STATUTES AND RULES

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 ..... 2, 17

Fed. R. Civ. P. 47 ..... 14, 15

Fed. R. Civ. P. 59(c) 3

Fed. R. Evid. 603 15

Fed. R. Evid. 606(b) 14, 15

Petitioner Gilbert Arreola respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit on direct appeal is reported at *Arreola v. Choudry*, 533 F.3d 601 (7th Cir. 2008) (Appendix A). The district court's opinion denying Arreola's motion for new trial is unreported.

STATEMENT OF JURISDICTION

The Seventh Circuit issued its opinion on July 14, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (2008).

PROCEDURAL, CONSTITUTIONAL, AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides that

> [n]o person shall be . . . deprived of life, liberty, or property, without due process of law.

U.S. Const. amend. V.

STATEMENT OF THE CASE

A. Introduction

From May 14, 2007, through May 17, 2007, the Petitioner Gilbert Arreola, through his court-appointed counsel, tried a claim under 42 U.S.C. § 1983 against Dr. Muhammed Choudry, the former medical director of the Hill Correctional Center in Galesburg, Illinois. Arreola asserted that Choudry acted with deliberate indifference with regard to Arreola's fractured ankle, which was not diagnosed for six days.

Arreola injured his ankle during recreation. He spent the night in the prison health care unit awaiting Choudry's arrival the next morning. Upon discovering Arreola was Jewish, Choudry refused to examine Arreola's ankle injury and sent him back to his cell. Arreola's religious affiliation was listed on the back of his prison identification card. Choudry, a Muslim, testified at trial and provided a much different version of events. He stated that he examined Arreola and diagnosed him with an ankle sprain after pressing on his ankle at the site of the fracture and finding no tenderness. X-rays taken six days later showed the fractured ankle. Both parties called orthopedic experts to testify regarding the nature of Arreola's fracture and Choudry's treatment.

One of the questions asked of prospective jurors on the juror questionnaire, Question 19, was whether they or anyone close to them had suffered a broken or severely sprained foot, ankle, or leg. During the district court's follow-up questioning of each prospective juror

who answered "yes" to question 19, not a single juror revealed that he or she personally had suffered a recent broken or severely sprained foot, ankle or leg. Juror 20, Ms. Laterza, answered "no" to Question 19. She did not amend or amplify this answer during her individual questioning by the district court.

The jury returned a verdict in favor of Choudry. Afterward some of the jurors voluntarily met with the attorneys for both parties in the courtroom to discuss the case. During this discussion the foreperson of the jury, Juror 20, stated that she had suffered a badly sprained ankle. She also stated that, based on her own ankle injury, she had no problem believing that Dr. Choudry could press on Arreola's ankle without finding tenderness. Another juror, Juror 21, stated that the foreperson discussed her ankle injury with her. Juror 21 described the foreperson's ankle injury as recent.

Arreola filed a motion for a new trial and attached two affidavits from the respective attorneys who heard the comments of the foreperson and Juror 21, pursuant to Fed. R. Civ. P. 59(c). Respondent filed a response, arguing that the motion should be denied because the comments by the foreperson and Juror 20 did not justify a new trial. At the initial hearing on Arreola's motion, the district court ordered Arreola to file a Reply on June 11, 2007, and scheduled a status hearing on the matter for June 14, 2007. The court explained that if, after reading the briefs, the court determined that an evidentiary hearing was necessary, the hearing would occur directly after the status hearing on June 14, 2007. In his reply, Arreola reiterated his request for a new

trial or, in the alternative, requested an evidentiary hearing at which the foreperson and Juror 21 be called to testify.

B. The Hearing

On June 14, 2007, the juror bias hearing took place. Counsel did not know which witnesses would be called or how evidence would be adduced until the trial court announced its plan to the parties at the hearing. At the end of the court's status call on June 14, the district court turned to Arreola's motion as follows:

> THE COURT: I need you folks up here. Can you give your names for the record, please?
>
> MR. SALEMI: Scott Salemi for Dr. Choudry, the defendant.
>
> MS. CULLISON: Laura Cullison and Andrew Fuchs and Torey Chambers on behalf of plaintiff, Mr. Gilbert Arreola.
>
> THE COURT: I have made arrangements for the juror in question to be available by phone at her workplace now. We are going to go back to chambers.
>
> We are going to spend about two or three minutes for you to give me any suggestions for questions that you wish me to ask her. I am going to be the only person asking questions. I will take those under advisement. We will get the person on the phone.

We need to do this fairly quickly because she is expecting a call, and we will move ahead from there, okay. So we are going to stop right here, and we are going to go back in chambers.

It is just going to be the court reporter and as few lawyers as possible because I am going to need to tell the juror who all is on the phone, and I don't want it to be a big crowd. So make some judgments about that, okay.

(The following proceedings were had in chambers:)

THE COURT: Before we get the juror on the phone, the record should reflect that we are in chambers. I am here, the court reporter is here, Mr. Salemi and Ms. Cullison.

I had my—

Actually, I put at a point in time when I knew that Ms. Laterza would be at work, I left—the only number we had was a home number. I left a message on her voice mail saying that I had a couple of follow-up questions for her. This would have been either Monday or Tuesday, and I asked her to call my assistant so that she could give her a number where we could reach her at 11:00 o'clock today. My assistant didn't know the purpose of the call.

Ms. Laterza apparently called yesterday and left a work number, which I have got here. So

she was expecting a call about 10 minutes ago. It's about 10 after 11:00 right now.

Obviously what I intend to do—maybe it is not so obvious—I intend to ask her—I need to tell her who is here, obviously. And I intend to ask her—tell her that there has been a question raised about one of the answers on her questionnaire and that I needed to ask her some follow-up questions about that.

That's not necessarily the precise words I am going to use.

Then I will proceed essentially try to get at whether she, in fact, did have a broken or severely sprained ankle, foot or leg, which is what the question read, and whatever other information I think is necessary about that.

So does anybody have any specific questions beyond those subject matters that you want me to ask *because nobody other than me in this room is going to be talking, and I am not going to take interruptions so that you can confer, think, whatever. So whatever you have got, you need to tell me now or forever hold your peace.*

MS. CULLISON: We drafted questions that are probably ones that you have already considered, but we weren't certain how this would go. So I thought that would be—

THE COURT: I am not going to ask these questions in this way. You can make this part of the record at some point.

And as far as discussing with the other jurors, honestly, there is a rule of evidence that precludes admission of that. So that is definitely not going to be part of this, and this is going to be done in a way that does not—and I want to be real clear about this—this is going to be done in a way that does not do anything that in the least bit will deter any person from wanting to serve on a jury.

So I am going—I know what the subjects are because I have read the cases that have been cited. I will ask what I think is appropriate.

Have you got anything, Mr. Salemi?

MR. SALEMI: Just consistent with those cases, my concerns are, one, if she intentionally gave a false answer.

THE COURT: We may or may not get to that. It depends on what her answers are to the earlier questions that I am going to give her.

Intentionally, and the other one is?

MR. SALEMI: The final would be whether or not her answer on the profile calls for her to be fair and impartial or her ankle injury calls for her to be unfair—

> THE COURT: I am not sure I am going to get to that either, but I understand that that is potentially an issue depending on what the answer to the first question is. So we will cross that bridge when we get to it.
>
> MR. SALEMI: Yes, sir,
>
> (Phone dialed.)

(Appendix C) (Emphasis added.)

Without swearing in the witness, the court proceeded to ask the foreperson whether she had suffered a severely sprained ankle. In the space of this brief telephone call, she answered that question three different ways:

> THE COURT: Was it a sprain that you regard as a severe sprain?
>
> FOREPERSON: It hurt to walk. Oh, my gosh, yes, I did.
>
> * * *
>
> THE COURT: Okay. And when you answered the questionnaire "no" were you trying to conceal or hide anything or anything like that?
>
> FOREPERSON: No. You know what? I forgot about it.
>
> * * *
>
> THE COURT: Okay. So inother words, if I were to ask you right now, do you regard that as

> having been a sprain that you would regard as severe sprain, would you say it was?
>
> FOREPERSON: I would have to say no because I was able to walk.

(Appendix A 5a-8a).

Counsel for both parties were required simply to sit silently while the court adduced its evidence and made its ruling. After hanging up the telephone, the district court immediately ruled on Arreola's motion and denied the motion for a new trial.

C. The Appeal

Arreola raised two issues on appeal before the Seventh Circuit. First, Arreola argued that the juror bias hearing denied Arreola adequate procedural due process. While trial courts are grante discretion in addressing juror bias, that discretion did not extend beyond the limits of due process. However, Arreola did not assert on appeal that procedural due process mandated a full-blown adversarial hearing, with each side calling witnesses in open court subject to direct examination and cross-examination by the attorneys. Moreover, Arreola did not assert that procedural due process mandated the district court to ask a specific question of interest to Arreola. Instead Arreola argued that the wholly inquisitorial structure of the hearing, at which the district court alone adduced evidence and then made its ruling while counsel sat in forced silence, violated procedural due process under the balancing test of *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (observing there could be no due process without "'the

opportunity to be heard'" (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). The Respondent argued that, because the juror bias hearing was at the district court's discretion, procedural due process did not apply. The Respondent did not challenge the district court's determination that a hearing should be held.[1]

The Seventh Circuit found that Arreola's procedural due process rights were satisfied based on a concept not found in the Federal Rules or in this Court's jurisprudence—"post-verdict voir dire." The circuit court concluded that the district court's investigation via post-verdict voir dire provided adequate due process in the context of a juror bias hearing.

Second, Arreola argued that, although hampered by the limited evidence adduced by the district court, this evidence nevertheless showed that he should be granted a new trial. The foreperson "failed to answer honestly a material question on voir dire," where "a correct response would have provided a valid basis for a challenge for cause." *See McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548 (1984). Regarding the first part of the *McDonough* test, Arreola contended that the forepersons answers during voir dire

---

[1] The Seventh Circuit's opinion begins with a discussion of its precedent concerning when a full-blown hearing on juror bias is required. The court notes in *dicta* that it believes such a hearing was not required or necessary in this case, and then proceeds to analyze the procedural due process issue and conclude that procedural due process was met. However, Arreola never argued that he was entitled to every aspect of a full-blown hearing here. Instead, Arreola argued that the hearing did not meet minimum due process standards.

were material, dishonest, and factually inaccurate. The Respondent argued that Question 19 was not material and that the foreperson did not lie during voir dire.

The Seventh Circuit applied the subjective *McDonough* test, which requires the movant to show that the juror was intentionally dishonest during voir dire. The circuit court found that the foreperson was not intentionally dishonest during voir dire, based on her testimony at the juror bias hearing. *Arreola*, 533 F.3d at 608. Accordingly, the circuit court concluded that the first part of the *McDonough* test was not met. The circuit court did not reach the second part of the *McDonough* test in affirming the district court's decision.

REASONS FOR GRANTING THE PETITION

I. This Petition Raises an Important Question of Federal Law Regarding Procedural Due Process in Juror Bias Hearings

Arreola respectfully requests that this Court grant a Writ of Certiorari because this petition raises an important question of federal law that has not been, but should be, settled by this Court: when does a juror bias hearing fall short of the minimum required by procedural due process? Justices Brennan and Marshall thought this question worthy of consideration by this Court. *Porter v. Illinois*, 479 U.S. 898, 900 (1986) (Marshall, J., and Brennan, J., dissenting) (asserting petition for certiorari should have been granted in capital case to consider whether "the trial judge's inquiry into juror bias in this case fell far short of the minimum required by the Due Process Clause of the Fourteenth Amendment"). When does a juror bias hearing fall short of the minimum required by procedural due process?

It is inconsistent with the Fifth Amendment, and with our adversarial legal system, for a juror bias hearing to be a wholly inquisitorial process wherein the district court alone adduces evidence while counsel are required to sit silent. While some parties may agree to a limited inquiry conducted by the district court, *see United States v. Calbas*, 821 F.2d 887, 896 (2d Cir. 1987) (finding no abuse of discretion in conduct of juror bias hearing where district court met and conferred with attorneys twice before the hearing), there was no such conferral here. Instead, the district court announced the process for the hearing, then conducted the hearing—refusing to allow counsel to speak during the hearing—and rendered its ruling. As explained below, this inquisitorial process failed to meet procedural due process standards.

A. A Juror Bias Hearing Must Provide Procedural Due Process

"[P]rocedural due process rules are shaped by the risk of error inherent in the truthfinding process . . . ." *Mathews*, 424 U.S. at 344. There are various hallmarks of the procedural due process typically afforded under our adversarial system during an evidentiary hearing. Such hallmarks include sworn testimony in open court, the opportunity to call witnesses, the opportunity to examine witnesses, the opportunity to cross-examine witnesses, and the opportunity for counsel to speak and make objections during the hearing. *See, e.g., Davis v. Alaska*, 415 U.S. 308, 316 (1974) (observing that "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested" and noting that a witness's credibility can be attacked "by means of cross-examination directed

toward revealing possible biases, prejudices, or ulterior motives"); *Miller-El v. Cockrell*, 537 U.S. 322, 334 (2003) (noting that the deference accorded to a trial court's determination regarding credibility is based in large part on the opportunity of the trial court to observe witnesses' demeanor in open court—an opportunity the reviewing court does not have); *United States v. Boney*, 68 F.3d 497, 502 (D.C. Cir. 1995) ("Because a person may not recognize, or admit to, certain subtle biases, it is often only through more specific questions that a person's prejudices are revealed. This rather rudimentary observation underlies our entire adversary system, where cross-examination is considered essential . . . .").

The collective effect of denying all of these hallmarks of procedural due process during Arreola's juror bias hearing violated the Fifth Amendment. Whatever floor procedural due process provides, this evidentiary hearing fell through the floor.

B. The Denial of Due Process Prejudiced Arreola

The inquisitorial process employed here was far from harmless error. The inquisitorial process prevented counsel from raising objections during the hearing (for example, regarding the failure to swear in the witness). The inquisitorial process foreclosed whole areas of investigation. For example, there was no investigation regarding the timing and nature of the discussions between the foreperson and Juror 21 about the foreperson's injury. The foreperson was Juror Number 20, which meant that the two jurors (20 and 21) sat next to each other in the jury box during the trial. There

was no investigation into how the foreperson could forget about her ankle injury on Monday during voir dire and then, at the trial's conclusion on Thursday, have her memory fully restored. While jurors certainly bring personal experiences with them into the jury room, voir dire is intended to identify those significant, intense, or recent personal experiences that would make the juror unfit to serve (for example, a juror's recent experience of an injury that is similar to the injury at issue in the trial). *See Burton v. Johnson*, 948 F.2d 1150, 1158 (10th Cir. 1991) (finding juror was biased in part due to the similarity of her personal experience to facts of the case). The denial of procedural due process pinioned Arreola's right to a fair trial. Such denial is not harmless.

C. A Wholly Inquisitorial Procedure Does Not Provide Adequate Procedural Due Process

Three other issues contained in the Seventh Circuit's opinion support the conclusion that this hearing created an unacceptable risk of an erroneous result pursuant to *Mathews*. First, even if the Court is willing to entertain the concept of post-verdict voir dire, the question remains as to what post-verdict voir dire means. If one relies on Fed. R. Civ. P. 47, which sets forth the parameters for pretrial voir dire, then the district court's process here was still inadequate, in that counsel was denied the direct or indirect follow-up questioning required by Rule 47. Second, the district court and the Seventh Circuit stated that their inquiry was limited by Fed. R. Evid. 606(b). In so doing, the courts assumed that the conversations between Juror 21 and the foreperson happened during deliberations. However, the district court did not inquire into the timing of these

conversations. Third, the foreperson's testimony was unsworn—a violation of Fed. R. Evid. 603, which requires that witnesses testify under oath.[2] These additional matters under Fed. R. Civ. P. 47 and Fed. R. Evid. 603 and 606(b) support the conclusion that this hearing denied Arreola adequate procedural due process.

The manner in which the district court conducted this hearing, and the Seventh Circuit's untested adoption of post-verdict voir dire as adequate under the Fifth Amendment, pose a concise, clearly positioned question for this Court to address regarding an issue of significant importance—the minimum procedural due process afforded to the parties in a juror bias hearing.

II. This Petition Offers the Opportunity to Resolve a Circuit Split Regarding the *McDonough* Juror Bias Test

Arreola respectfully requests that this Court grant a Writ of Certiorari and resolve the split between the circuit courts by concluding that both material deliberate lies and material inaccurate answers during voir dire can support a finding of juror bias under *McDonough*. *See Jones v. Cooper*, 311 F.3d 306, 310 (4th Cir. 2002) (citing *McDonough*, 464 U.S. at 555).

---

[2] "Federal Rule of Evidence 603 requires every witness to swear or affirm that he will tell the truth. The idea behind the rule is to preserve the integrity of the judicial process by awakening the witness' conscience and making the witness amenable to perjury prosecution if he fibs." Wright & Gold, Federal Practice and Procedure (1990) § 6041, pp. 254-261 (discussing the history of oath-taking).

In *McDonough*, four members of the Court adopted a two-part test to address the situation where a party moves for a new trial based on juror bias, as indicated by incorrect information given by a juror during voir dire. 464 U.S. at 556. To obtain a new trial, the movant must show "that a juror failed to answer honestly a material question on voir dire" and that "a correct response would have provided a valid basis for a challenge for cause." *Id.* Justice Rehnquist, writing for the plurality, explained that test for determining a dishonest answer was subjective, because there was no such thing as a theoretical "average juror" to assess objectively. 464 U.S. at 555.

Four members of the Court set forth a two-part test . . . . Justice Brennan wrote a separate concurrence, joined by Justice Marshall. Justice Brennan noted that that "one easily can imagine cases in which a prospective juror provides what he subjectively believes to be an honest answer, yet that same answer is objectively incorrect and therefore suggests that the individual would be a biased juror in the particular case." *Id.* at 559 (Brennan, J., joined by Marshall, J., concurring in judgment). Justice Blackmun also wrote a separate concurrence, joined by Justices Stevens and O'Connor. Blackman noted that "regardless of whether a juror's answer is honest or dishonest," a defendant may be entitled to relief if he "demonstrate[s] actual bias, or in exceptional circumstances, that the facts are such that bias is to be inferred." *Id.* at 556 (Blackmun, J., joined by Stevens and O'Connor, JJ., concurring). The lower courts have applied *McDonough* in both criminal and civil trials, but the interpretation of the *McDonough* test has varied, as discussed below.

A. The Subjective Test Covers Only Deliberate Falsehoods

In interpreting *McDonough*, the First, Second, Third, Sixth, Seventh, and Ninth Circuits apply a subjective test, requiring evidence that the juror supplied or withheld the relevant information during voir dire with a deliberate intent to lie or mislead. *Amirault v. Fair*, 968 F.2d 1404, 1405-06 (1st Cir. 1992) (*McDonough* test not met in prosecution for assault, battery, and rape of child because juror who had been raped as child blocked incident from memory); *United States v. Shaoul*, 41 F.3d 811, 815-16 (2d Cir. 1994) (*McDonough* test not met because defendant, by conceding good faith of juror who failed to disclose family relationship with prosecutor not involved with defendant's case, failed to show that juror answered question dishonestly); *United States v. Hodge*, 321 F.3d 429, 441 (3d Cir. 2003) (*McDonough* test not met in prosecution for narcotics and weapons-trafficking offenses where juror failed to disclose her familiarity with defendant during voir dire, because failure to disclose was honest mistake); *Williams v. Bagley*, 380 F.3d 932, 943, 948 (6th Cir. 2004) (*McDonough* test not met when juror testified that another juror might have concealed prior knowledge of case because there was no deliberate concealment); *Arreola v. Choudry*, 533 F.3d 601 (7th Cir. 2008) (first part of *McDonough* test not met in case brought under 42 U.S.C. § 1983 because juror not a "dishonest person" during voir dire); *United States v. Edmond*, 43 F.3d 472, 473-74 (9th Cir. 1994) (*McDonough* test not met in armed robbery prosecution where juror simply forgot about being victim of armed robbery twenty-six years earlier; "forgetfulness does not indicate lack of impartiality").

The effect of applying the subjective test is reflected in the way the district court investigated Arreola's claim here. The district court did not objectively test the accuracy of the foreperson's answer to Question 19. This is consistent with Justice Rehnquist's observation that there is no such thing as a theoretical "average juror." 464 U.S. at 555. Instead the inquiry turns on the particular juror's subjective intent to lie or mislead.

Here, once the foreperson stated that she did not think, upon reflection, that she suffered a severe ankle injury, that was the end of the inquiry. If she did not subjectively think the injury was severe, there was no basis to conclude that she deliberately lied during voir dire. Moreover, she stated that she simply forgot about the injury during voir dire. Thus, under the subjective interpretation of *McDonough*, the inquiry was over. The Seventh Circuit reiterated the subjective *McDonough* test on appeal and noted that the foreperson's testimony during the bias hearing failed to show that she was a dishonest person.

B. The Objective Test, Covering Deliberate Falsehoods and Honest Mistakes, is the Proper Standard

On the other hand, the Fourth, Eighth, and Tenth Circuits follow an objective interpretation of *McDonough*. Under the objective standard, the subjective intent of the juror when answering questions during voir dire does not determine whether the *McDonough* test is met. Instead, a failure to answer honestly covers both material deliberate falsehoods and material honest mistakes. *See Jones*, 311 F.3d at 310

("Although in *McDonough* the juror's incorrect response in voir dire was an honest mistake, the test applies equally to deliberate concealment and to innocent non-disclosure...."); *United States v. St. Clair*, 855 F.2d 518, 522-23 (8th Cir. 1988) (new trial required in prosecution for conspiracy to construct destructive device because juror admitted during deliberations to seven years of experience with explosives and, whatever the juror's motivation, did not speak up during voir dire). *Burton v. Johnson*, 948 F.2d 1150, 1158 (10th Cir. 1991) ("Assuming that the juror had answered the voir dire question honestly," the record still showed juror was biased due to the similarity of her personal experience to facts of the case).

Applying the objective test to Arreola's bias hearing would lead to a much different inquiry. The reasons for the foreperson's memory lapse, the recent nature of the foreperson's injury, and the similarity of the foreperson's injury to the case at hand would all be relevant factors to consider in determining bias, whether or not the inaccuracy was intentional. A juror's post hoc assessment of how he or she would have answered the question would be one piece of evidence for the district court to assess, but it would not determine the outcome.

As recognized by the Fourth, Eight and Tenth Circuits, and Justices Brennan, Marshall, Blackmun, Stevens and O'Connor in *McDonough*, bias can be manifested in various ways, not just by intentional dishonesty. The objective test best upholds the constitutional guarantee to a fair, but not necessarily perfect, trial. *McDonough*, 464 U.S. at 553. A juror's post hoc assessment of why he or she answered a

question a certain way should not, by itself, answer the question of whether a juror was biased. "[T]he bias of a juror will rarely be admitted by the juror himself, 'partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it.'" *Id.* at 558 (Brennan, J., concurring in the judgment) (quoting *Smith v. Phillips*, 455 U.S. 209, 221-22 (1982) (O'Connor, J., concurring)).

Arreola asks this Court to resolve the split among the circuit courts regarding the *McDonough* test and affirm the objective standard. Whether a juror fails to answer honestly during voir dire should be measured objectively to include both material deliberate falsehoods and material honest mistakes.

CONCLUSION

WHEREFORE, for the foregoing reasons, Petitioner Gilbert Arreola respectfully requests that this Court grant his Petition for a Writ of Certiorari.

Respectfully submitted,

LAURA D. CULLISON
Counsel of Record
CHRISTINA M. TCHEN
333 West Wacker Drive
Chicago, Illinois 60606
(312) 407-0510

Counsel for Petitioner